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March 25, 1991

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CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Honorable Dan Morales
Attorney General of Texas
Supreme Court Building
P.O. Box 12548
Austin, Texas 78711-2548

Attention: Mr. Rick Gilpin
Opinion Committee

RECEIVED

MAR 27 91

Opinion Committee

Re: Whether the County Clerk is authorized to collect a fee under TEX. LOCAL GOV'T CODE ANN. § 118.052(2)(B)(i) (Vernon Supp. 1991) for the filing of legal instruments such as requests for admissions and interrogatories in an adverse probate action?

Dear General Morales:

The Harris County Clerk has requested advice regarding the above-captioned matter. Please furnish us with your opinion on the question presented. A Memorandum Brief is enclosed.

Sincerely,

MIKE DRISCOLL
County Attorney


By MERCEDES LEAL
Assistant County Attorney

Encl.

ACCOMPANIED BY ENCLOSURES —
FILED SEPARATELY

MEMORANDUM BRIEF

The County Clerk of Harris County requests an opinion regarding what fees, if any, can be charged for the filing of certain legal instruments, such as requests for admissions and interrogatories, in adverse actions filed in the probate courts. Sections 118.051 through 118.065 of the Local Government Code generally set forth the fees which may be collected by the County Clerk. Apparently, there are some inconsistencies and differences of opinion as to the construction of these statutes.

Section 118.057 prescribes the fee for filing an adverse probate action and states:

(a) The fee for "Adverse Probate Action" under Section 118.052(2) is for clerical duties in an adverse action, contest, or suit in a probate court (other than the filing of a claim against an estate) in which the movant or applicant filing the intervention pleadings seeks any affirmative relief. There is no charge for filing an original answer or response that is strictly defensive to a previously filed pleading.

(b) The fee is charged of the party initiating the adverse action or contest.

(c) The fee does not apply to services for which a fee is prescribed by Section 118.052(1), 118.052(2), 118.052(3)(A), or 118.052(3)(B). (emphasis added).

Section 118.056 sets forth the fees which can be collected by a county clerk for "Services in Pending Probate Action." This section provides:

(a) The fees for "Services in Pending Probate Action" under Section 118.052(2) are for services in an action in an open probate docket rendered after the filing of an order approving the inventory and appraisement or after the 90th day after the date of the initial filing of the action, whichever occurs first.

(b) The fee for filing a document also applies to each page or part of a page for the filing of a document or exhibit filed by a movant after the

filing of an original answer or response, after the filing of an order approving the inventory and appraisal, or after the 90th day after the date of the initial filing of the action, whichever occurs first, and before the filing of an adverse action, contest, suit, or pleading seeking affirmative relief.

(c) Each fee shall be paid in cash at the time of the filing or the rendering of the service and is in addition to other fees prescribed by Section 118.052.

TEX. LOCAL GOV'T CODE ANN. § 118.056 (Vernon 1988). Section 118.052(2), which is cited in section 118.056, sets forth the fees which shall be collected by the County Clerk for filing a document in a pending probate action (\$3.00 for the first page and \$2.00 for each additional page or part of a page). See TEX. LOCAL GOV'T CODE ANN. § 118.052(2)(B)(i) (Vernon Supp. 1991).

One possible interpretation placed on section 118.052(2)(B) is that the fees authorized by this section for filing a document in a "Pending Probate Action" apply only to those documents which are filed before the filing of an adverse action, contest, suit, or pleading seeking affirmative relief. See TEX. LOCAL GOV'T CODE ANN. § 118.056 (b) (Vernon 1988). However, once an adverse probate action is filed, it can be argued that a county clerk can no longer collect filing fees under section 118.052(2)(B)(i). In a previous opinion issued by the Attorney General in 1985 which interpreted article 3930(b), V.T.C.S., the prior law, the Attorney General concluded that the state statutes do not authorize any fees to be charged by county clerks in adverse actions in the probate court, except the fee to be paid by the party initiating the adverse action as authorized by article 3930(b), section 1, paragraph B(1)(c) of Texas Revised Civil Statutes Annotated (now section 118.057 of TEX. LOCAL GOV'T CODE ANN. (Vernon 1988)). See Op. Tex. Att'y Gen. No. JM-346 (1985). The opinion also cited Rodeheaver v. Alridge, 601 S.W.2d 51, 54 (Tex. Civ. App. - Houston [1st Dist.] 1980, writ ref'd n.r.e.), wherein the court stated that:

A reading of Article 3930(b) shows that the \$25.00 fee which the county clerk is to collect for each filed adverse action or contest covers not only the clerk's services for the initial filing of the action but also many other services which will accrue during the processing of the suit. Thus, the statutory fee is, in effect, an advance payment for the cost of services which have not been rendered at the time the fee is collected.

However, it can also be argued that the filing of an adverse probate action does not preclude a county clerk from collecting filing fees under section 118.052(2)(B)(i) since the only prohibition contained in section 118.057(a) is that no fee can be charged for filing an original answer or a responsive pleading that is strictly defensive to a previously filed pleading. See Op. Tex. Att'y Gen. No. JM-168 (1984). This interpretation is supported by section 118.057(c) which provides that the \$35.00 fee prescribed for filing an adverse probate action is not meant to cover other services performed by a county clerk's office for which a fee has also been prescribed by section 118.052(2)(B). Thus, section 118.057(c) does not support the holding in Rodeheaver that the statutory fee prescribed for filing an adverse probate action is intended to cover all other services which are performed by a county clerk in an adverse probate action. Of course, section 118.056(a) requires that fees charged for services which are performed in an action in an open probate docket under section 118.052(2)(B) can only be charged for services "rendered after the filing of an order approving the inventory and appraisal or after the 90th day after the date of the initial filing of the action, whichever occurs first." (emphasis added).

We recognize that there is language in section 118.056(b) which could be interpreted as preventing a county clerk from collecting filing fees under section 118.052(2)(B)(i) after an adverse probate action has been filed. We believe, however, that section 118.056(b) does not prohibit the collection of filing fees in an adverse probate action. Instead, section 118.056(b) merely clarifies what filing fees can be collected before the filing of an adverse probate action. After an adverse probate action is filed, section 118.056(a) applies and 118.056(b) is no longer applicable. We note that in larger estates probate administration may go on for years. In such cases, it seems unreasonable and illogical to construe the statutes as permitting a party to avoid having to pay filing fees by simply filing an adverse action, whereas in cases where no adverse action is filed, the parties remain subject to payment of the filing fees. See 67 Tex. Jur.3d Statutes § 89 (1989)(an act should be given a fair, rational, reasonable and sensible construction).

In addition, section 118.057 specifically addresses the fees which can be collected in an adverse probate action. Consequently, it is this section, rather than section 118.056(b), which controls a county clerk's authority to collect filings fees in an adverse probate action. See Cuellar v. State, 521 S.W.2d 277, 279 (Tex. Crim. App. 1975)(a special statute controls over a general statute regardless of the order the statutes were enacted); see also 67 Tex. Jur. 3d Statutes § 126 (1989). As mentioned earlier, section 118.057 would only prohibit a county clerk from collecting a filing fee under

section 118.052(2)(B)(i) if the document is an original answer or a response that is strictly defensive to a previously filed pleading.

CONCLUSION

Based upon our reading of the relevant statutes, a county clerk is authorized to collect filing fees under section 118.052(2)(B)(i) for legal instruments filed in an adverse action, provided that the document is not an original answer or a response which is strictly defensive to a previously filed pleading.